STANDARD FORM NO. 64

Office Memorandum • UNITED STATES GOVERNMENT

TO : Files

DATE: 10 March 1949

FROM [redacted] STATINTL

SUBJECT: Dual Compensation restrictions applied to employment by CIA of an individual working outside regular hours of Non-conflicting employment.

1. This Agency is presently planning to obtain the services of a Government employee for work to be performed outside his normal working hours. There is no anticipated or forseeable conflict between the two types of employment, and, although the employee is presently receiving an annual salary, we wish to enlist him on either a salary or per diem or fee basis. The question of conflict with the various dual compensation statutes thus presents itself.

2. The present law has evolved from a series of statutes dating back to 1839. The provisions are found in Sections 58, 62, 69 and 70 of Title 5 USCA and are to be construed in pari materia. Generally, -- unless expressly authorized by law -- they prohibit: compensation for extra services (Section 69); additional pay, extra allowances, or compensation to any officer or other person, whose salary, etc. is fixed by law or other regulations (Section 70), holding a double office (Section 62), availibility of money for more than one salary (as a further limitation of Section 62)(Section 58). There are some additional exceptions relating to retired military and naval personnel which are clearly defined in the statute and are extraneous to a general discussion of the topic.

3. The interpretation and understanding of these statutes has been a source of continual disagreement among both jurists and executives for a long period of time. Although some confusion has been resolved, the cases present a chain of conclusions which is lacking in any unequivocal uniformity.

4. The purpose of these statutes and the conflicting interpretation of them is well stated in Title 5 USCA Section 58, note 3:

> "The evil intended to be guarded against by these statutes was not so much plurality of office as it was additional pay or compensation to an officer holding but one office for performing additional duties or the duties properly belonging to another. If he actually and rightfully holds two commissions and does the duties of two distinct offices he may, in so far as this section is concerned, receive the salary which has been appropriated to each office. (1878) 16 Op. Atty. Gen. 7; (1877) 15 Op. Atty. Gen. 306.
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> "On the otherhand it has been said that the Acts are intended not only to destroy double or extra compensation, but to prevent the holding of more than one office or employment under the Government by one person at the same time, without explicit authority of law.*** (1857) 9 Op. Atty. Gen. 123."

5. A leading case on the subject is U.S. v. Saunders, 120 US 128 (1887). The question here arose from employment of an individual as a

clerk of a committee in the House of Representatives at the same time he held the position of a clerk in the Office of the President. The court held (in regard to Sections 58, 69 and 70) that:

> "We are of the opinion that taking these sections altogether, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which as such officer he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him, either by Act of Congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is, in the eye of the law, two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations."

The case was cited with approval by the Attorney General in 19 Op. Atty. Gen. 121 (1888) as the latest authority; but it should be noted tha t the decision was handed down prior to the passage of the Act of 1894 which has been construed by some judges as a distinct renunciation of the theory of double office for which the Saunders case stood. The Saunders case was later cited in Pack v. U.S., 41 Court of Claims 414 (1906), but the court restricts its application in saying:

> "If the distinct offices were specially authorized by law to be held by the same person, as in the act provided, then the compensation attached to both may be paid to the incumbent,**"

The claim here arose through employment by the Navy Department at the same time the employee held an appointment as a Notary Public. In reviewing the pertinent statutes, the court also stated that:

> "It would be difficult to conceive of statutes more explicit for the purpose indicated, but as they would not permit the holding by the same person, of 'two distinct offices, places or employments, each with its own compensation and duties,' the Congress soon after the decision in the case last cited (US v. Saunders), passed the act of July 31, 1894** which, so far has applied to this case, reads:
>
> "'Section 2*** No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized there to by law; but this shall not apply to retired officers**.'"

This understanding of the Act of 1894 is supported by the Attorney General in 34 Op. Atty. Gen. (1925):

> "There is little doubt but that the Act of 1894 was enacted to prevent an employee of the Government from holding two positions and receiving the salary provided for each by law."

In U.S. v. Shea, 55 F.(2nd) 382 (1932), a District court accepted the interpretation of Section 58 as overcoming the previous doctrine of the Saunders case that one person can be regarded as two officers. The court, however, did not find that employment as a court messenger at a fixed salary was incompatible to a position also held as court crier at a per diem. In Woodwell v. U.S., 214 US 82(1908), the doctrine that one person may hold two separate and distinct offices was reaffirmed but the additional compensation was prohibited by the extra allowance restrictions of Section 70. There, an engineer in the Treasury Department performed his full time job during the same period that he was providing engineering assistance to the Department of the Interior. There was no appropriation provided for the engineer's services by the Department of the Interior, nor was there a personal contract between the engineer and Interior. He had simply been designated by Treasury to perform the additional services and the court found that he was not called upon to render a service required by law for which there was any fixed remuneration.

6. At this point it seems necessary to distinguish between Sections 69 and 70 which prohibit payment of extra compensation and allowances, and the Sections 58 and 62 which restrict the use of money, or the appointment of individuals, for another office carrying a fixed salary. Under Sections 69 and 70, the prohibition only applies to extra compensation for services incompatible with those for which the compensation is fixed. Offices are incompatible when the performance of the duties of one will prevent or conflict with the performance of the duties of the other, or when the holding of the two is contrary to the policy of the law. (Title 5, USCA, Section 58, note 3). Section 58, on the other hand, relates only to the payment of double salaries; and, in this respect, a salary has been defined as:

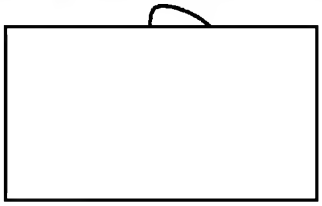
> "**a fixed periodical compensation paid for services rendered; a stated compensation, amounting to so much by the year, month, or other fixed period, to be paid to public offices or person and persons in some private employments, for the performance of official duties or the rendering of services of a particular kind, more or less definitely described***" Black's Law Dictionary, Third Ed.

In Section 62, the prohibition explicitly applies to a holding of an "office", or, in definition, "a public station or employment conferred by the appointment of government." The term embraces the idea of tenure, duration, emolument, and duties. U.S. v. Hartwell, (Mass. 1868) 6 Wall. 385, 18 L. Ed. 83. In summary, it appears that the prohibitions contained in 69 and 70 depend primarily upon the incompatibility of the two types of employment and in Sections 58 and 62 the distinction rests upon whether or not an additional office and fixed salary is involved. Section 58 restricts the appropriation of money for payment to any person receiving more than one salary when the combined amount of such salary exceeds two thousand dollars a year. Section 62 provides that no person holding an office with a fixed salary of two thousand five hundred dollars may be appointed to or hold any other office with a fixed compensation. Section 69 and 70 restrict the payment of and receipt of extra compensation for work already established by law without regard to amount.

7. It would thus appear that the prohibitions of Sections 69 and 70 would not apply to any work performed in a temporary capacity by an individual who held a position at a fixed salary in an entirely dissimilar line of

endeavor. Nor would Sections 58 and 62 be restrictive if the additional work was of such insufficient tenure that it would not fulfill the definition of an "office", and would not carry any compensation at a fixed or consistent rate which could be considered a "salary". An indication of the type of compensation required to escape the prohibitions of Sections 58 and 62 is indicated in an opinion of the Comptroller General to the Secretary of the Navy on December 29, 1948 (B-80106). A retired military officer was employed by the Atomic Energy Commission as a consultant on an intermittant basis. The appropriate statute (5 USCA §59A) restricted the compensation to be paid a retired military officer holding a civilian office. The Comptroller stated "that where the nature of the duties required is purely advisory, generally performed at infrequent intervals, and the compensation payable therefor is upon a fee basis as distinguished from a purely time basis, the status of the employee is not such as would constitute the holding of an office or position within contemplation of" the statute. Since the officer in this situation was employed at a stipulated per diem when actually working, with proportionate deductions for less than a full day's employment, it was held that he was paid on a time basis as distinguished from a fee basis and was therefore subject to the restrictions of the Act. This is somewhat more limited than the interpretation given in the Shea case where additional compensation at per diem was not considered prohibited by Section 58.

8. It is therefore submitted that there is sufficient diversity in the interpretation of these statutes to warrant any reasonable terms of employment, provided the additional work is dissimilar in nature to the regular employment and provided it is not for a fixed tenure at a definite annual salary.



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Dec 80106 involves
Rear Adm. Schuyler,
U.S. Navy, Retired.
(see Vol. 28, Dec. of Comp. Gen.)